DISTRICT OF COLUMBIA
RENTAL HOUSING COMMISSION

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GABRIEL FINEMAN, Appellant /Tenant, V. SMITH PROPERTY HOLDINGS VAN NESS L.P., Appellee/Housing Provider	:	Case No.: 2016 DHCD **TP 30,842** 3003 Van Ness Street, N.W., Apt. W-1131

BRIEF OF APPELLANT/TENANT

The Appellant/Tenant Gabriel Fineman (the "**Tenant**") hereby submits this brief in the appeal of the final order (the "**Order**") issued on March 16, 2017 by the Office of Administrative Hearings ("**OAH**"), Administrative Law Judge Ann C. Yahner presiding.

STATEMENT OF THE ISSUES

As the Tenant stated in his Tenant Petition (the "**Petition**"), in his Request for Summary Judgment (the "**Request**"), and in his Reply to the Landlords Opposition to the Request for Summary Judgment (the "**Reply**"), the matter at issue in this case is the notice given to the tenant and specifically does not include the lease, how the rent is calculated, flex-leases, concession leases, or rent ceilings.[1] Nonetheless, both the Landlord in its Housing Provider's Opposition to Mr. Fineman's

[1] "This petition is only to correct the line entitled 'Your current rent charged' on the RAD form 8 and the associated filed RAD form 9. It does not deal with the lease, how the rent is calculated, flex-leases, concession leases, rent ceilings or other items normally decided in a civil court." [Petition page 1; Motion for Summary Judgment §I, p. 1; Reply §I, p. 1]

Motion for Summary Judgment and Cross Motion for Summary Judgment (the "**Opposition**") and OAH in its Order focused primarily on the notion that concession leases are legal and proper.[2] As will be shown below, OAH did not directly address the issues at the core of this case and committed multiple errors in construing the rent increase notice requirements that apply to housing providers.

The issue before the OAH was narrow, involving only the lawfulness under the Rental Housing Act of 1985 (**"Act"**) of the rent increase notices provided to the Tenant and the Rental Accommodations Division ("RAD"). The overarching issue in this case is whether the Appellee/Housing Provider ("**Landlord**") was correct in listing the maximum allowable rent for the unit as the "current rent charged" in both RAD Form 8 (notice to the tenant) and RAD Form 9 (certificate of notice to RAD) or whether it should have listed the actual rent that the tenant paid each month as the "current rent charged" on the two forms.

1. Did OAH abuse its discretion when it found, unsupported by any evidence in the record and in the limited context of a motion for summary judgment, that the term "rent charged" had become a "term of art" in the rent-controlled housing industry [Order at 11] and means the maximum rent that could be charged rather than the actual monthly rent?

2. Did OAH abuse its discretion and err as a matter of law in refusing to follow the clear requirements of the rules of statutory construction when interpreting the phrase "rent charged" and in ignoring the statutory definition of the term "rent"?

[2] In its Objection, the Landlord raised only two issues in its Analysis: "A. The Use of a Concession Does Not Reduce the Legal Rent; Rather it Limits the Amount Paid by a Tenant During the Concession Period; … [and] B. Petitioner Cannot Prevail on His Claim that the Rent Increase was Larger than Permitted Under the Rental Housing Act."

3. Did OAH err as a matter of law in ruling that "[t]he terms on the RAD forms cannot be interpreted independently of the lease"? [Order at 10]

4. Did OAH err as a matter of law in finding that the purpose of showing the "current rent charged" is to tell the tenant of the maximum legal rent for the unit? [Order at 15]

5. Did OAH err as a matter of law in holding that there are no statutory provisions that preclude using the maximum legal rent as the current rent charged? [Order at 10]

6. Did OAH err as a matter of law in holding that leases could be used to define the term "rent" as an amount other than the rent actually to be paid by the tenant without leading to multiple definitions of the term "rent" and distorting the statutory definition of the term? [Order at 11]

7. Did OAH err as a matter of law or abuse its discretion in finding that the Tenant's lease and RAD Form 8 are consistent in identifying the maximum legal rent that could be charged for the unit? [Order at 11]

8. Did OAH err as a matter of law and abuse its discretion in making a policy judgment that concession leases were beneficial for tenants, justifying its holding in part on a fact that was not in the record by finding that the Landlord "apparently was responding to market pressures when it leased the unit to Tenant at a lower rent"? [Order at 12, 13]

TERMINOLOGY

The word "rent" is used in various ways by the parties to mean different things. Therefore, for clarity we specify the various terms and explain what each means. Only three terms are defined in the Act: "rent," "rent ceiling," and "rent charged."

a. "**Rent**" is defined by the Act as "the entire amount of money, money's worth, benefit, bonus, or gratuity demanded, received, or charged by a housing provider as a condition of occupancy or use of a rental unit, its related services, and its related facilities." [D.C. Official Code § 42–3501.03(28)]

b. "**Rent Ceiling**" is defined in the Act as "that amount defined in or computed under § 42-3502.06." [D.C. Official Code § 42–3501.03(29)] The part of § 42-3502.06 that defined "rent ceiling" was repealed by the Rent Control Reform Amendments Act of 2006, which expressly states that rent ceilings are abolished. However, the OAH claimed in the Order that the term "lives on" in the regulations that have never been repealed.[3] [Order at 6, n.3]

c. "**Maximum Legal Rent**" is the maximum amount of rent that a landlord could charge for a unit if market conditions allowed it to fully implement every applicable rent increase authorized by District law.[4] Examples of authorized rent increase include annual increases, vacancy increases, and rent increases authorized by petitions or voluntary agreements. This amount is not what the landlord is required to charge, but rather the maximum that it can charge. Once the housing provider establishes the Actual Rent for a unit through a written lease or a month-to-month tenancy, that rent becomes both the rent charged and the new Maximum Legal Rent for the unit until such time as another rent increase is authorized by District law and implemented in whole or in part. A

[3] The term "base rent" is defined in D.C. Official Code § 42-3501.03(4) and 14 DCMR § 4201.1 and was used to calculate the rent ceiling when rent ceilings were in effect.

[4] When § 42–3502.06 was amended by the Rent Control Reform Amendment Act of 2006, the following provision remained in effect: "Except to the extent provided in subsections (b) and (c) of this section, no housing provider of any rental unit subject to this chapter may charge or collect rent for the rental unit in excess of the amount computed by adding to the base rent not more than all rent increases authorized after April 30, 1985, for the rental unit by this chapter, by prior rent control laws and any administrative decision under those laws, and by a court of competent jurisdiction."

Maximum Legal Rent that has not been adjusted (usually reduced) to the rent charged is referred to as the unadjusted Maximum Legal Rent.

d. "**Rent charged**" is defined in the Act as "the amount of monthly rent charged to a tenant by a housing provider for a rental unit covered by the Rent Stabilization Program." [5]

e. "**Actual Rent**" is the amount that the landlord collects each month (absent a default) and is the amount that the tenant expects to pay.

f. "**Market Rent**" is the amount that could be charged for a unit if rents were not limited by rent control rules. It is based on the rents charged for other, similar units that are not subject to rent control. It is usually the advertised cost of the apartment.

g. "**Current Rent**" is one of the terms at issue in this case. The Tenant argues that Current Rent means the Actual Rent while OAH asserts in the ruling below that it means the unadjusted Maximum Legal Rent, which is the theoretical rent that could be charged before the "rent charged" is established for the unit by entering into a lease with a tenant or adjusting the rent of an existing tenant.

ARGUMENT

The issue before OAH was narrow and dealt with notice and not with rent. Did the Appellee/Housing Provider correctly complete the required notices (RAD Form 8 and RAD Form 9) (the "**Notices**") when it listed the unadjusted Maximum Legal Rent for the rental unit as the "Current Rent Charged," or should it have used the Actual Rent that was paid by the Tenant each month?

[5] D.C. Official Code § 42–3501.03(29A) (added to the D.C. Code by A21-0655 (Elderly and Tenants with Disabilities Protection Amendment Act of 2016), it was signed by the Mayor on February 9, 2017 and became effective on April 7, 2017).

OAH's Order went into many other issues, including the legality of concession leases (specifically excluded in the Tenant's Petition) and bills introduced by members of the District Council (that do not establish legislative history for the laws at issue in this case because they were introduced after the statutes at issue in this case were enacted and of course died without becoming law).

1. OAH committed an error of fact and abused its discretion in stating that "[t]he term 'rent charged' has become a term of art[6] in the rent-controlled housing industry." [Order at 11] The Order did not cite any law or evidence in support of that proposition because none was offered by the Landlord. The Landlord made no claim that the term "rent charged" was a term of art in the OAH proceeding. OAH made no representation that it was a term of art that was used by members of the general public or even by members of the District's tenant population. Similarly, OAH made no claim that the term "rent charged" was a term of art for District government officials. Rather, OAH asserted only that it was used in the "rent-controlled housing industry." [Order at 11] The implication of this OAH conclusion is that this understanding of the meaning of the term "rent charged" was an understanding held by the small group of landlords that use concession leases.[7]

[6] Term of art means: "a term that has a specialized meaning in a particular field or profession" Merriam-Webster [https://www.merriam-webster.com/dictionary/term%20of%20art]; another dictionary definition is "A word or phrase that has a precise, specialized meaning within a particular field or profession." Oxford English Dictionary [https://en.oxforddictionaries.com/definition/term_of_art] In this case, great care should be exercised in injecting a term associated with a particular field or profession (large rent-controlled landlords) into the larger world where it will directly and concretely affect laypersons who are not members of the field or profession (like tenants) and who do not have the same understanding of the "term of art." There is nothing in the Act to indicate that it was intended to mislead tenants who receive these notices by applying a "term of art" gloss to statutory terms so that common words lose their ordinary meaning.

[7] Indeed, it does not even have this specialized meaning for many landlords who use the same term but give it a very different meaning. Many landlords do not use concession leases and thus file the Actual Rent as the rent charged in their submissions to tenants and RAD. For example, several blocks to the south of the Rental Accommodation is the Quebec House Apartments, a 900-unit rent-controlled complex that does not use concession leases.

Instead, the Tenant introduced evidence showing that the terms "rent" and "rent charged" were used by the Landlord to mean Actual Rent (rent to be actually paid by the Tenant) in all important contexts when dealing with the public.[8] In addition, the Tenant provided evidence that RAD does not review or examine the RAD Form 9's submitted by housing providers to RAD[9] and thus their acceptance for filing by the RAD did not imply or reflect approval of the Landlord's submissions.

The question of whether the term "rent charged" is actually a term of art is important to statutory construction since different methods of statutory construction are applicable if the term under examination is a term of art (see § 2, below). To be a term of art in a particular field or profession (and a term of art only has meaning for the members of such a group), it must have been developed so as to acquire that specialized meaning for participants in that particular field or profession. (see footnote 6 above.) It is important to be aware of what the particular field or profession is so as not to make assumptions that such jargon has the same meaning to individuals who are not members of that field or profession and therefore do not understand it or give it the same meaning. It is highly unlikely that the drafters of the Act included provisions that were intended to mislead members of the class of persons it is designed to protect (tenants) simply because they do not use industry jargon and are not familiar with the alternative meaning attached to the term "rent charged" by industry insiders.

Although "rent charged" may be a term of art in a very narrow field (and there is no evidence in the record to support that proposition), there was absolutely no evidence in the record to support the

[8] See Reply, Exhibit 1 where we examine this issue in great detail including: (a) use of the terms in advertisements for apartments and referencing the Affidavit (exhibit 2) and the screen shots (Exhibit 3); (b) the Landlord's explanation of the lease rent to prospective tenants (Exhibit 4); (c) the use of the term "the monthly rent is" in Landlord/Tenant Court to mean the Actual Rent (Request, Exhibit F, Second Affidavit).

[9] Reply, IV.A.a; Reply, Exhibit 5, point 14; Reply Exhibit 5, Attachment A.

proposition that the very narrow field included members of one of the groups of individuals who actually receive the disclosures (tenants) and are the intended beneficiaries of the disclosure requirement. Even if it were a term of art recognized by all involved (including tenants), the legislative history would still be examined to understand the drafters' intentions with regard to the notice requirements. That legislative history shows unambiguously that the term "rent charged" was the Actual Rent and was not the same as Rent Ceiling (at the time, a rough counterpart to today's unadjusted Maximum Legal Rent). For example, the Reasoning for the Consensus Legislation on page 12 of the law's legislative history[10] is described as follows:

> An example should suffice. If the **rent charged** comes to $1,000 per month and the **rent ceiling** comes to $4,000 per month, under the current law, a CPI of even 4% would raise the **rent ceiling** to $4,160 per month and the **rent charged**, which can be increased by that same dollar amount, to $1,160 per month. [emphasis added]

Relief Sought: Hold that the term "rent charged" is not a term of art that is understood to be the unadjusted Maximum Legal Rent by the landlords required to issue the notices and, most important, by renters (including the Tenant) entitled to receive the notice and that nothing in the record supported that finding.

2. A critical error of law in the Order was OAH's failure to follow the clear requirements of statutory construction in interpreting the phrase "rent charged." At the heart of this case is the definition of the term "rent charged." The meaning of this term is clear: it means the Actual Rent paid by the tenant. The Landlord provided no evidence about the meaning of the term "rent charged" in the OAH proceeding below. Despite the absence of a record, OAH nonetheless ruled that "rent charged"

[10] Reply, Exhibit 1, 5.c; Reply, Exhibit 5, page 13. Also see the 2005 report of the Office of the Inspector General at http://app.oig.dc.gov/news/view2.asp?url=release%2FRent_Control_Final_Report_12-13-05%2Epdf&mode=release&archived=1&month=200511&agency=0 or http://tinyurl.com/vloemyf

was a "term of art" that meant the potential rent that the Landlord *could* have charged (i.e., the unadjusted Maximum Legal Rent). [Order at 10, 15]

The courts provide clear procedures[11] for construing ambiguous statutory provisions.[12] OAH veered well outside the boundaries of those procedures by looking to extraneous matters like private contracts (e.g., the Tenant's lease) for clarification. The definition of the terms "rent" and "rent charged" should be interpreted only by common and plain definitions (usually found in dictionaries),[13] and then any ambiguous words should be interpreted only in relation to other terms of the statute or its legislative history. Further, because the requirement to file RAD forms applies to all housing providers in the District subject to rent control and is independent of any particular lease or other contract,[14] the Act does not include provisions that permit its definitions to be superseded or

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[11] The rules of statutory construction are well established in this jurisdiction. "Our first step when interpreting a statute is to look at the language of the statute." Jeffrey v. United States, 878 A.2d 1189, 1193 (D.C.2005). "The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used." Peoples Drug Stores, Inc. v. District of Columbia, 470 A.2d 751, 753 (D.C.1983) (en banc) (citing Varela v. Hi-Lo Powered Stirrups, Inc., 424 A.2d 61, 64 (D.C.1980) (en banc)). "It is axiomatic that 'the words of the statute should be construed according to their ordinary sense and with the meaning commonly attributed to them.'" Id. (quoting Davis v. United States, 397 A.2d 951, 956 (D.C.1979)). When interpreting the language of a statute, we must look to the plain meaning if the words are clear and unambiguous. District of Columbia v. District of Columbia Office of Employment Appeals, 883 A.2d 124, 127 (D.C.2005) (citing Jeffrey, supra, 878 A.2d at 1193). Usually "[w]hen the plain meaning of the statutory language is unambiguous, the intent of the legislature is clear, and judicial inquiry need go no further." District of Columbia v. Gallagher, 734 A.2d 1087, 1091 (D.C. 1999) (citations omitted). [District of Columbia v. Place, 892 A.2d 1108, 1108 (2006)]

[12] Any question of statutory interpretation begins with looking at the plain language of the statute to discover its original intent. To discover a statute's original intent, courts first look to the words of the statute and apply their usual and ordinary meanings. If after looking at the language of the statute the meaning of the statute remains unclear, courts attempt to ascertain the intent of the legislature by looking at legislative history and other sources. Courts generally steer clear of any interpretation that would create an absurd result which the legislature did not intend. Wex Legal Dictionary, Legal Information Institute, Cornell University Law School. https://www.law.cornell.edu/wex/statutory_construction.

[13] The starting point in statutory construction is the language of the statute itself. The Supreme Court often recites the "plain meaning rule," that, if the language of the statute is clear, there is no need to look outside the statute to its legislative history in order to ascertain the statute's meaning. ['Statutory Interpretation General Principles and Recent Trends' by Congressional Research Service - The Library of Congress March 30, 2006 page CRS-1]

[14] There could be ten different contracts with ten different definitions of rent.

modified by private contract. In other words, private contracts like leases must comply with the law rather than attempt to change or replace the law by establishing meanings for terms that are the opposite of what the legislative body intended and have the effect of depriving tenants of basic rights.

A summary of the proper method for statutory construction is:

a. Look at the definition of each word in the dictionary

b. Put those definitions together to interpret the phrase

c. Check that the interpretation is not unreasonable

d. If there is still ambiguity (or if the term being construed is a "term of art"),[15] look at the legislative history.

In the proceeding below, the Tenant provided OAH with a full statutory construction of the term "rent charged" as used on the RAD forms.[16] OAH dismissed this thirteen page analysis by saying that leases are to be construed as contracts and that the lease says that the rent is the amount of the unadjusted Maximum Legal Rent. [Order at 10-11] OAH erroneously holds (see § 3 below) that the terms on the RAD forms cannot be interpreted independently of the Tenant's lease. Even as it reached this conclusion, it made no effort to reconcile or explain the relationship between the lease and the RAD forms. OAH made no attempt to do any analysis as required by statutory construction before issuing its rulings on the meaning of this term. In failing to perform the required analysis,

[15] "Real property" is a term of art defined by D.C. Code § 47-802(1) (2001) to mean …. we cannot say that the provision authorizing supplemental assessments is clear and unambiguous. … Thus, we must look to the legislative history of the statute so that we may interpret the relevant provision [term of art] in a way that is "more faithful to the purpose than [to] the word." Jeffrey, supra, 878 A.2d at 1193 (citations omitted). District of Columbia v. Place, 892 A.2d 1108, 1108 (2006).

[16] Reply, Exhibit 1.

OAH violated the requirements of standard rules of statutory construction established by District courts.

OAH apparently did little more than conclude that landlords had been entering the unadjusted Maximum Legal Rent as the "current rent charged" in their RAD Forms 8 and 9 for years and therefore should be assumed to be acting lawfully. While the Landlord may have engaged in this practice for a number of years, many other landlords do not follow the practices favored by the Landlord. Many leases for rent-controlled apartments in the District are not concession leases even in cases where units are rented for less than the unadjusted Maximum Legal Rent. In those cases, RAD filings typically show the current rent as the Actual Rent.[17]

The term "rent charged" was recently defined in the Act[18] as the amount of monthly rent charged to a tenant. The definition seems at first glance to be circular but it adds an important clarification to help define the term "rent charged." It states that "rent charged" means the amount of monthly rent charged to a tenant, describing the interaction between the landlord and the tenant. Under this definition, "rent charged" means what is actually charged to the tenant and not what could have been charged to the tenant. This is consistent with the purposes of the Form 8 Notice – to give the tenant notice of what its actual rent increase will be so that the tenant can budget for the increase or find alternate rental accommodations. Ruling, as the OAH did (that it means the unadjusted Maximum

[17] An example of a large rent controlled building that does not use concession leases is the nearby Brandywine Apartments.

[18] "'Rent charged' means the amount of monthly rent charged to a tenant by a housing provider for a rental unit covered by the Rent Stabilization Program." D.C. Official Code § 42–3501.03(29A), added by A21-0655 (Elderly and Tenants with Disabilities Protection Amendment Act of 2016) and effective on April 7, 2017.

Legal Rent), would put most landlords, that disclose the Actual Rent, in none compliance with the notice requirements.

In addition, the Act has, since its inception in 1985, contained a detailed definition of the term "rent," which is crucial to understanding the term "rent charged." That definition defines "rent" as "the entire amount of money, money's worth, benefit, bonus, or gratuity demanded, received, or charged by a housing provider as a condition of occupancy or use of a rental unit, its related services, and its related facilities." [D.C. Official Code § 42–3501.03(28)] OAH failed to take this definition into account in its Order, simply ignoring this well-established definition of a central component of the term "rent charged," which, on its face, appears to limit "rent" to the amount of money (or its equivalent) that is actually received by the landlord from the tenant.

That OAH attempted to rationalize its decision by devoting several pages to a discussion of a legislative bill that was not enacted into law and ignored the bill that was enacted into law (and was in effect when it issued the Order). [Order at 13-15] This discussion of extraneous legislative materials is yet another example of OAH's abuse of discretion as well as an obvious error of law.

Relief Sought: Hold that the term "rent charged" means the actual rent charged to the tenant and not the unadjusted Maximum Legal Rent.

3. OAH erroneously ruled that "[t]he terms on the RAD forms cannot be interpreted independently of the lease." [Order at 10] The Landlord did not make this claim in the proceeding below except to say that the Act cannot be read in a vacuum. There is no evidence in the record to support OAH's ruling that the lease must be used to determine the amount of "rent charged." There may be some convenience associated with the using the lease (because arguably all the numbers are in one place and have been agreed to by both parties), but, in this case, the lease does not use the term "rent

charged" or other terms used on the RAD forms and is not necessarily dispositive on the question of the amount of "rent charged." Further, leases are generally one-sided contracts that are written by the landlord and designed primarily to protect landlord interests.

The Tenant presented substantial evidence in the proceeding below to refute that claim that the lease is essential to determine the Actual Rent. Examples of other ways to determine the amount of rent include: (a) the amount housing provider tries to collect[19]; (b) the amount the Landlord debits from the account of the Tenant each month[20]; and (c) the amount defined as rent in Landlord/Tenant Court.[21] OAH did not examine any of these methods, and the Landlord made no attempt to rebut them in the Landlord's Opposition.[22]

Relief Sought: Reverse the holding that RAD rent notice requirements are tied to the provisions of a lease and hold that "rent charged" is an objective term based on current and actual rent charges as reflected in the course of dealing between the landlord and the tenant.

4. OAH erred by finding that the purpose of showing the "current rent charged" is to tell the tenant of the maximum legal rent for the unit. [Order at 8] No citation is provided in support of this novel finding and there is no basis in the record or in law for this finding. The record shows that the official title of RAD Form 8 is "Housing Provider's Notice to Tenant of Adjustment in Rent Charged." Its purpose is to tell the tenant of an upcoming change in the rent, providing the tenant with the time to budget for the change or to seek alternative living arrangements. That amount is the

[19] Motion, IV.B.b; Motion, Exhibit A, point 8; Motion, Exhibit E.

[20] Motion, IV.B.d; Motion, Exhibit A, point 8 (first Affidavit); Motion, Exhibit E (bank statement).

[21] Motion, IV.B.e; Motion, Exhibit F (second Affidavit).

[22] Reply, IV, 2.

Actual Rent and not the unadjusted Maximum Legal Rent.[23] The RAD Form 8 notice meets that purpose if the Actual Rent is shown but will not meet that purpose if the unadjusted Maximum Legal Rent or some other theoretical amount is shown. A tenant cannot plan for housing costs if the unadjusted Maximum Legal Rent is listed in the form instead of the Actual Rent to be charged. Housing providers who do not use concession leases show the Actual Rent on these forms and not the unadjusted Maximum Legal Rent, making it easier for tenants to plan for the future. OAH's holding is based on the false assumption that a majority of housing providers are filing incorrect RAD forms. Relief Sought: Reverse the holding that RAD Form 8 in intended to notify the tenant of the unadjusted Maximum Legal Rent and hold that the purpose of disclosing the current rent charged (i.e., the Actual Rent) to the tenant on RAD Form 8 is to help tenants plan for a rent increase.

5. It was an error by OAH to hold that "there are no statutory or regulatory provisions that define the terms on the RAD forms to preclude using the maximum legal rent as the 'current rent charged' . . ." [Order at 11] The statute states that the Notices must provide "… a statement of the current rent" [D.C. Official Code § 42–3502.08(f)] and does not authorize the provision of the unadjusted Maximum Legal Rent (or any variation on the theoretical maximum rent) in lieu of the "current rent." See also D.C. Code § 42-3502.05(g)(1)(A) (copies of tenant Notices must specify both the "previous rent charged" and the "new rent charged"). District law expressly and unambiguously defines "rent charged" as the rent charged to the tenant[24] and requires that RAD notices include the "rent charged." It does not provide for or sanction any alternative to the definition of "rent charged."

[23] Reply V.A.c; Reply Exhibit 1, Section 4.
[24] See § 2, above and footnote 18.

Relief Sought: Hold that the rent charged as stated on the RAD forms must reflect the rent charged to the tenant and not the unadjusted Maximum Legal Rent or any variation on that theoretical maximum rent that is not charged to the tenant.

6. OAH erred as a matter of fact and law in holding that using the lease to define the term "rent" would not "lead to multiple definitions of the term 'rent' and a distortion of the statutory definition of the term.¨ [Order at 11] In making this determination, OAH was responding to the Tenant's examination of whether the terms of a lease could override the statutory definition of the term "rent" and its use in the RAD forms.[25] OAH's holding is inconsistent with the Act and the evidence in the case. OAH provided no citation to either law or evidence. In fact, many other landlords do not define rent in their leases as the unadjusted Maximum Legal Rent but instead use the Actual Rent. Further, they report the Actual Rent as the "current rent" to RAD and do not list the unadjusted Maximum Legal Rent as the current rent.[26]

Some leases include additional items in the tenant's rent[27] like parking fees, pet charges, or move-out fees but fees for these items are not subject to regulation under the Act and therefore would not be included in the "rent charged" for the unit or listed on RAD Form 8 or 9. Just because

[25] The obligation of the Housing Provider to provide proper notices and filings is an independent obligation between the Housing Provider and the District (RAD) and does not arise from or is dependent upon or is even related to a written lease, even if there is a written lease.

[26] Examples of such nearby large apartment houses are the Kenmore, the Brandywine, and the Quebec House.

[27] In fact, the Landlord's lease defines rent in this way – as including the fees for these additional items in rent: "Total Monthly Rent and additional rent are, together, referred to in this Lease as 'rent.' "Objection Exhibit 1 and 3, section 4 Additional rent includes utilities (id. section 14) and repair and maintenance (id, section 21). Other leases may include items that are not defined in Landlord's lease as additional rent such as cleaning and trash removal charges or use of the freight elevator or key replacement charges or may not include some items of dubious legality in the Landlord's lease, such as maintenance charges. In fact, many leases do not have additional rent at all nor provide for concession leases. See, for example the National Apartment Association Lease, widely used in DC for large and small apartment complexes and available at https://www.naahq.org/sites/default/files/naa-documents/lease/NAA-Training-Video-Sample-Lease.pdf .

there are multiple definitions of rent in use in the District does not affect the definition of "rent" in the statute and the related definition of "rent charged" unless we are to accept OAH's logic and adopt the definition of this particular Landlord as District-wide law, excluding all other definitions in other leases.[28]

Relief Sought: Reverse the OAH ruling that multiple definitions of "rent" for purposes of RAD Forms 8 and 9 are lawful under the Act and hold that all housing providers subject to RAD disclosure requirements must list the Actual Rent as the "current rent charged" in RAD disclosure forms.

7. OAH erroneously claims that the "Tenant's lease and RAD Form 8 are consistent in identifying the maximum legal rent that could be charged for the unit." [Order at 8] It further claims that "[r]ent concessions benefit tenants most obviously by reducing, in some cases substantially, the rent for an apartment." [Order at 13] Neither of these findings is supported by the record. There is no evidence in the record that the amount stated in the lease is actually the maximum legal rent. The Tenant's lease[29] identifies "Total Monthly Rent" but does not specify a maximum legal rent. Neither the term "maximum legal rent" nor any similar term is used in the Tenant's lease. Similarly, neither the term "maximum legal rent" nor any similar term is used in the RAD forms. Instead, RAD Forms 8 and 9 use the term "Current Rent Charged."

Further, there is no evidence in the record "that concessions benefit the tenant." Instead, the Tenant introduced evidence that "concessions" were used to increase his rent significantly. In 2016, the Tenant should not have experienced a rent increase under the District's rent control laws (he was

[28] This would, of course, arguably make RAD notices of many other housing providers incorrect.
[29] Objection, Exhibits 1 and 2.

over 62 and protected by D.C. Code § 42-3502.08(h)(2)'s special limits on rent increases for senior citizens in a year when the CPI was 0%) but instead faced a demand from the Landlord that he pay a large rent increase of $132 (6%). This rent increase was to be implemented by reducing the size of his concession. Far from reducing his rent, the best and final offer of the Landlord in these sham negotiations was $2,301. After the Tenant gave notice, the Landlord immediately listed the apartment for the much lower rent of $1,980 (a 10% reduction) and a rent that was the actual Market Rent for the unit.[30]

Relief Sought: Hold that the amount stated in the lease should comport with the District's rent stabilization laws as to the "rent charged" and increases in the "rent charged" and should not attempt to preserve past rent increases that were authorized but not implemented.

8. OAH erred as a matter of law and abused its discretion in making a policy judgment that concession leases were beneficial for tenants, justifying its holding in part on a fact that was not in the record by finding that the Landlord "apparently was responding to market pressures when it leased the unit to Tenant at a lower rent."[31] It went on to opine that "[r]ent concessions benefit tenants most obviously by reducing, in some cases substantially, the rent for an apartment."[32]

The only case law cited in support of the legality of concession leases is an unrelated and irrelevant case, Double H Housing Corp. v. David, 947 A.2d 38, 46 (D.C. 2008) [Order at 10], dealing with the lawfulness of a landlord's tying the availability of a rent discount to whether the tenant

[30] Reply, Exhibit 2, Point 6.

[31] Order at 12.

[32] Order at 13.

signed a new lease agreement. The Double H case is inapposite and not relevant to this case because it dealt with the landlord-tenant relationship for a rental unit that was exempt from the District's rent control laws and therefore was not subject to any of the regulations at issue in this case that apply only to setting rents for rent-controlled apartments.

The question of whether rent concessions are beneficial for tenants is a policy matter that is within the domain of the District Council and was not properly a matter for OAH determination. In any event, Tenant introduced evidence in the OAH proceeding that the Actual Rent (after the first year) was substantially above the Market Rent.[33] In Tenant's case, concessions did not benefit but rather seriously harmed him after the first year of his tenancy. The purposes of the Act are listed in the Order [Order at 12; see also D.C. Official Code § 42-3502.01], with the first one being "to protect low- and moderate-income tenants from the erosion of their income from increased housing costs." The Act advances this purpose by, among other things, limiting the annual rent increases to the CPI plus 2%. See D.C. Official Code § 42-3502.08(h). The Landlord circumvents these basic tenant protections by misstating the "current rent charged" on RAD Forms 8 and 9 and using concession leases that are made possible by this systematic misrepresentation of the actual "rent charged" in RAD submissions. This deceptive practice increases the actual housing costs and erodes the income of tenants in contravention of the Act's most basic purposes.

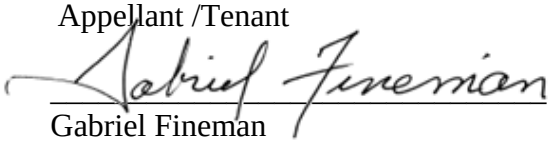
Relief Sought: Hold that concession leases violate the intent of, and subvert the purposes of, the Act and are invalidated to the extent that they attempt to circumvent the basic provisions of the Act by attempting to preserve for future use expired rent increases.

[33] Reply, Exhibits 2, 3 and 5.

RELIEF SOUGHT

The Tenant respectfully asks the Rental Housing Commission, in addition to the relief sought above, to reverse the OAH Order dismissing the Tenant's Petition as to all matters with respect to the definition of "rent charged" and "current rent charged" for purposes of RAD Forms 8 and 9 and remand the case to OAH for further proceedings consistent with the definition of "rent charged" as the amount of rent actually paid by the tenant and as not including any authorized but expired rent increase that is not reflected in the amount of rent actually paid by the tenant.

Respectfully submitted,
Appellant /Tenant



Dated: July 21, 2017

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DISTRICT OF COLUMBIA
RENTAL HOUSING COMMISSION

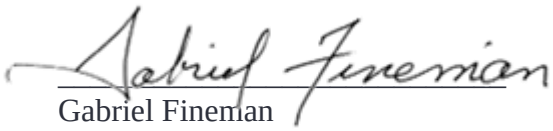
★ ★ ★

GABRIEL FINEMAN,	:	
Appellant /Tenant,	:	
	:	Case No.: 2016 DHCD **TP 30,842**
V.	:	3003 Van Ness Street, N.W., Apt. W-1131
SMITH PROPERTY HOLDINGS VAN NESS L.P.,	:	
Appellee/Housing Provider	:	

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Appellant/Tenant and the Statement of Material Facts not in Dispute was served on July 21, 2017, by first class mail, postage pre-paid upon the attorney for the housing provider:

Debra F. Leege
Greenstein DeLorme & Luchs, P.C.
1620 L Street N.W., Suite 900
Washington, DC 20036-5605



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DISTRICT OF COLUMBIA
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STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

Points 1 through 7 are all contained in the Statement of Material Facts Not in Dispute in Landlord's Opposition. (the "**Opposition**"). The remaining points were all stated by the Tenant in its Petition or in its Request for Summary Judgment and never objected to or disputed by the Landlord.[1]

1. Smith Property Holdings Van Ness L.P is the owner of the residential rental accommodation located at 3003 Van Ness Street, N.W. in Washington, D.C. (the "**Housing Accommodation**").
2. Equity Residential Management, L.L.C. manages the Housing Accommodation.

[1] This is a listing of the facts in the record and not any "facts" that may have been assumed by the OAH without any basis in the record.

3. Pursuant to lease agreements commencing on December 22, 2013 and expiring on December 21, 2016 (the "**Leases**"), the Tenant leased Unit W-l131 at the Housing Accommodation.

4. The Leases state that Petitioner is entitled to a monthly recurring discount (concession) per month (the "Concession") from the Ceiling Rent.

5. On September 18, 2015, Landlord sent Tenant a notice that his rent would be increased from $3,114 to $3,161 effective December 22, 2015.

6. On September 22, 2015, Housing Provider filed a Certificate of Notice to RAD of Adjustment in Rent Charged. It identified that effective December 22, 2015, the rent for the Unit increased by $47 from $3,114 to $3,161.

7. On or about October 7, 2016 Tenant sent Housing Provider a notice to correct the RAD form 8 and that request was never answered.[2]

8. Pursuant to a lease agreement commencing on December 22, 2015 and expiring on December 21, 2016 (the "2015 Lease"), the Tenant leased Unit W-1131 at the Housing Accommodation.[3]

9. The 2015 Lease states that Petitioner is entitled a monthly recurring concession of $946 per month (the "**Concession**").

10. The 2015 Lease also includes a Concession Addendum with the same language as the 2014 Lease.[4]

[2] Exhibit D and Exhibit A of the Tenants Request for Summary Judgment (Request)
[3] Attachment to the Tenant Petition
[4] Exhibits 2 and 4 of the Opposition

11. Tenant allowed the Housing Provider to debit his bank account monthly and paid the amount demanded by the Housing Provider.[5]

12. Rent is a term defined as follows in DC Code section §42-3501.03 (28) that applies to all of chapter 35, including the filing of RAD forms 8 and 9:

> "Rent" means the entire amount of money, money's worth, benefit, bonus, or gratuity demanded, received, or charged by a housing provider as a condition of occupancy or use of a rental unit, its related services, and its related facilities. [DC Code section §42-3501.03 (28)][6]

13. The Tenant claims that the rent was the Actual Rent, The Landlord never claimed that the Ceiling Rent was actually charged (a concession of zero). The amount charged should be assumed not to be in dispute.[7]

14. There was no objection by the Landlord to the Tenant's claim of an incorrect form 8 or any assertion by the Landlord that the "Current Rent Charged" reported on this form was correct. The invalidity of the form 8 notice should be assumed not to be in dispute. [8]

15. Landlord has failed to correct its form 8 despite clear notice that it was incorrect. The unwillingness of the Landlord to correct its incorrect notice should be assumed not to be in dispute.[9]

16. The amount of rent charged could be induced from the actions of the Housing Provider because the amount that the Housing Provider demanded from the Petitioner's bank, received by

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[5] Exhibit E and Exhibit A of the Request and Section ii.B (second paragraph) of the Opposition.

[6] Footnote 1 in section ii.B of the Opposition.

[7] Reply, IV 2 a

[8] Reply, IV 2 b

[9] Reply, IV 2 c

ACH transfer and charged to the Petitioner's account each month was the amount of Actual Rent and not the amount of the Lease Defined Rent. The Housing Provider did not object to that methodology and it should be assumed not to be in dispute. [Reply, IV 2 f]

17. The amount of rent charged could be deduced by the actions of the Landlord when it went into Landlord Tenant Court to evict tenants and used the Actual Rent and not the Lease Defined Rent as the tenant's rent. The Landlord did not object to that methodology and it should be assumed not to be in dispute. [10]

18. The issuance of the incorrect form 8 and the filing of the incorrect form 9 was done as a willful act that calls for a penalty to be assessed by the adjudicator. The Landlord did not object to this claim of the false filing being a willful act or to the analysis in the Motion under the Relief Section or the information in the Affidavit. The willfulness of the Landlord's false filings should be assumed not to be in dispute. [11]

[10] Reply, IV 2 g

[11] Reply, IV 2 h